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IN THE

Supreme Court of the United States

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October Term, 1966

No. 1232

A. C. CAVELL, Superintendent,
State Correctional Institution,
Rockview, Bellefonte, Pennsylvania,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA
ex rel. CHARLES E. WHITING

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

A Writ of Certiorari is respectfully sought to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on March 3, 1966.

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TABLE OF CASES CITED

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OPINIONS BELOW

Court of Appeals—The opinion of the Court of Appeals has not yet been reported. It is reproduced in Appendix A to this Petition.

District Court—The opinion of the United States District Court is reported in 244 F. Supp. 560. It is included in the printed record in the Court of Appeals filed herewith.

Pennsylvania Supreme Court—The opinion of the Pennsylvania Supreme Court, affirming denial of habeas corpus, is reported in 414 Pa. 17, 198 A. 2d 568. It is included in the printed record in the Court of Appeals filed herewith.

Pennsylvania Supreme Court—The opinion of the Pennsylvania Supreme Court on direct appeal is reported in 409 Pa. 492, 187 A.2d, 563. It is included in the printed record in the Court of Appeals filed herewith.

JURISDICTION

The judgment of the Court of Appeals was entered on March 3, 1966. Petition for rehearing was filed March 16, 1966, and was denied on March 24, 1966. The jurisdiction of this Court is invoked under 28 U. S. Code, §1254(1).

QUESTIONS PRESENTED

I. When no objection is made to the introduction of evidence at a state trial in 1956, on post-trial motions, or on direct appeal, can such an objection be later raised in the Federal Courts on habeas corpus?

II. Was there an illegal search and seizure involved in this case, and, if so, should a new trial be granted wherein the evidence seized is excluded?

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

Charles Edward Whiting was convicted in 1956 by a jury of first-degree murder and sentenced to life imprisonment. His conviction was affirmed by the Supreme Court of Pennsylvania: *Commonwealth v. Whiting*, 409 Pa. 492, 187 A.2d 563 (1963). Thereafter, he filed two petitions for habeas corpus which were denied by the Court of Common Pleas of Montgomery County and one of which was affirmed by the Supreme Court of Pennsylvania: *Commonwealth ex rel. Whiting v. Rundle*, 414 Pa. 17 (1964). A prior petition in the United States District Court, No. 590 Habeas Corpus, was denied on the ground of failure to exhaust state remedies. On this petition, No. 630 Habeas Corpus, the writ was granted on the issue of search and seizure.

The evidence upon which Charles Edward Whiting was convicted may be summarized as follows:

Juan Otero operated a tailor shop at 56 East Spring Avenue, Ardmore, Pennsylvania, and lived in a small connecting apartment in the rear thereof. Shortly after 9:15 P.M. o'clock on June 14, 1956, Mrs. Isabel Strickland, who lived in an apartment above, heard sounds of a quarrel, scuffling and screams emanating from the apartment connected with the tailor shop below. She went to her bedroom

window overlooking a rear entrance leading from the tailor shop premises to an alley, and saw a colored man, whom she did not recognize, start out of the Otero apartment and then immediately re-enter. It was dark and she could not see his face. Within seconds, the same individual came out again. He was dressed in a light "T" shirt, dark trousers, light baseball cap, and carried a paper clothing bag. Immediately alerting neighbors, Mrs. Strickland, together with the neighbors, hurried to the Otero premises and saw Juan Otero lying on the floor of the kitchen in a pool of blood. No one else was on the premises. Mrs. Strickland called the police at exactly 9:28 P.M. They arrived within minutes and found the victim dead as a result of six (6) stab wounds in his body. Otero had been seen alive by another neighbor about 9:00 P.M., standing in front of his tailor shop.

Within minutes thereafter, Mrs. Strickland went by automobile to the home of her family, three blocks away. After a very brief stop, she started home and en route saw a colored man of the same build and appearance as the man she saw leaving the Otero premises. He was walking along the street about a block and one-half from the scene of the killing, still wearing the same type of clothing de-described, but was not carrying a bag. She reported this fact to the police. At first, when she saw the individual she could not remember his name, but shortly afterwards realized it was Charles Edward Whiting, and she told the police. He was taken into custody and questioned about the killing early the next morning. A search of the room where he lived revealed a white "T" shirt, dark trousers, shorts, a military fatigue cap, and a paper clothing bag. Blood spots and blotches of blood were readily discernible on each of the items of clothing and on the clothing bag. The defendant admitted wearing this clothing on the night before.

In midmorning of June 15th, the defendant gave a statement to the police wherein he stated that he had been

in the Otero shop between 7:30 and 8:00 o'clock P.M., the night before to pick up some clothes previously left for attention. He said that he received his clothes, departed and did not return. Subsequently, he learned about the assault upon Otero and watched from nearby as the police placed the victim's body in the ambulance.

Later on the same day, Whiting gave another statement to the police, which was substantially different from the one previously given. Therein, he said he went to the tailor shop at 7:30 P.M., paid for his clothing but decided to leave it there until he was going home. He returned to the shop about 9:30 P.M., saw the body of the victim lying on the floor in a pool of blood. He knelt alongside the body, rolled it over, jumped up shaking the blood off his hand, grabbed his clothes and ran out of the rear entrance. He explained his unusual actions as being due to fright and emotional disturbance based upon his recollection of a similar experience while serving in the armed forces during the Korean War.

Laboratory tests disclosed that the specimens of blood found on the clothing and bag found in Whiting's room were the same blood type as that of the victim and of a type different from that of Whiting.

Pursuant to Whiting's petition for habeas corpus alleging, inter alia, illegal search and seizure of the blood-stained clothing, a hearing * was held which disclosed the following:

Petitioner testified that at 7:50 A.M. on June 15th, 1956, about six hours after he was identified by Mrs. Strickland as the man she saw leaving the tailor shop, he was taken into custody by a policeman at the corner of Spring Avenue and Simpson Road, Ardmore, Pennsylvania, one-half block from the scene of the murder. There was no warrant for his arrest, but its validity is conceded. He was taken four blocks in a patrol car to meet Captain Shaffer

* References to testimony at hearing are designated (N.H.). References to testimony at trial are designated (N.T.).